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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 ELLIOT McGUCKEN,

4 Plaintiff,

New York, N.Y.

5 v.

19 CV 9617 (KPF)

6 NEWSWEEK LLC,

7 Defendant.

8 -----x

Premotion Conference

9 January 7, 2020
10 11:45 a.m.

11 Before:

12 HON. KATHERINE POLK FAILLA,

13 District Judge

14 APPEARANCES

15 DONIGER BURROUGHS

16 Attorneys for Plaintiff

17 BY: LAURA M. ZAHARIA

18 COWAN, DeBAETS, ABRAHAMS & SHEPPARD, LLP

19 Attorneys for Defendant

20 BY: NANCY E. WOLFF

21 LINDSAY R. EDELSTEIN

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1 THE DEPUTY CLERK: In the matter of McGucken v.
2 Newsweek LLC, counsel, please state your names for the record
3 beginning with plaintiff.

4 MS. ZAHARIA: Laura Zaharia of Doniger Burroughs for
5 plaintiff Elliot McGucken.

6 MS. WOLFF: Nancy Wolff for defendant Newsweek, LLC.

7 MS. EDELSTEIN: And Lindsay Edelstein for defendant
8 Newsweek, LLC.

9 THE COURT: To the folks at the back table, is there
10 one of you to whom I should be directing questions? Ms. Wolff,
11 okay. Ms. Wolff, you've been dined out by your colleague.
12 Thank you both.

13 This is our initial conference in this case. It is
14 also a premotion conference in the case.

15 Ms. Zaharia, I am going to begin with you to talk
16 about your case, and then we'll talk about the defendant's
17 contemplated motion.

18 Tell me about your client.

19 MS. ZAHARIA: Thank you, your Honor. My client,
20 Dr. Elliot McGucken, is a fine art photographer. He maintains
21 a website where he sells some of his fine art prints. In March
22 of 2019, McGucken traveled to Death Valley to photograph a
23 certain natural phenomenon. He took a series of photographs
24 and registered them with the copyright office. He also
25 published the photograph at issue on his Instagram account.

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1 THE COURT: I appreciate that you've said to me that
2 he created and owns a valid copyright registration. If you
3 know, could you tell me the date that he filed or the date he
4 received and had the copyright registered? Because in your
5 letter of December 11 I didn't see it.

6 MS. ZAHARIA: Sure. The photographs were published on
7 March 8th, and the effective date of registration on the
8 copyright certificate is April 1st, 2019.

9 THE COURT: Okay. Please continue.

10 MS. ZAHARIA: McGucken published the photograph on his
11 Instagram account, and the next day, defendants reproduced and
12 displayed this image on their for-profit website alongside with
13 commercial advertising.

14 THE COURT: When they did that, your client may have
15 been surprised to see his photograph displayed, but did he
16 recall being interviewed by a reporter? I thought there was a
17 reference to a quote from him.

18 MS. ZAHARIA: He was not.

19 THE COURT: Where did the quote come from?

20 MS. ZAHARIA: His Instagram account.

21 THE COURT: I see. Thank you so much. So, he became
22 aware the next day or shortly thereafter that Newsweek had not
23 merely appropriated the photograph, but a quote that he had
24 embedded with the photograph on his Instagram account.

25 MS. ZAHARIA: That's correct.

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1 THE COURT: Again, please continue.

2 MS. ZAHARIA: So, the following month, McGucken
3 provided notice of his claims to Newsweek's designated
4 copyright infringement. This case was McGucken's last resort
5 after Newsweek failed to meaningfully respond.

6 THE COURT: Well, I want to understand what that
7 means, so thank you. He saw in or about the 14th of March that
8 the photograph -- well, was his photograph posted to Instagram
9 on the 13th?

10 MS. ZAHARIA: I believe so, your Honor.

11 THE COURT: Okay. I understand from your letter that
12 it was on the 14th of March that it was published on Newsweek's
13 website. Also correct?

14 MS. ZAHARIA: Correct.

15 THE COURT: When was the first time that he or someone
16 acting on his behalf contacted Newsweek to let them know that
17 he believed it inappropriate for them to have this content on
18 their website?

19 MS. ZAHARIA: It was early April of 2019, the
20 following month.

21 THE COURT: The following month. I see from your
22 letter to me there is a reference to a cease and desist letter
23 that is dated on or about April 4 of 2019. Was that the first
24 communication of which you are aware?

25 MS. ZAHARIA: Yes, your Honor.

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1 THE COURT: In substance, that says please take down
2 this -- well, what, take down the photograph?

3 MS. ZAHARIA: The cease and desist letter indicated
4 that McGucken owns the photograph at issue, that the defendants
5 were violating the DMCA, and that McGucken requested that
6 defendants remove the photograph from their website along with
7 providing certain information about the use of his website,
8 such as whether or not it was shared across other social media
9 sites, and information about the types of advertising that was
10 run alongside his photograph.

11 THE COURT: I am going to ask you, just for me and for
12 the court reporter, if you can slow down just a little bit.
13 Thank you very much. It is the acoustics in the courtroom;
14 it's not you.

15 All right. So this is on the 4th of April. Did he
16 receive a response, and if so, when and what was it?

17 MS. ZAHARIA: He did not receive a response.

18 THE COURT: Did he resend the letter or make some
19 other communication before reaching out? You just mentioned
20 someone that handles copyright information for Newsweek.

21 MS. ZAHARIA: Well, the cease and desist letter was
22 sent to the designated copyright agent for Newsweek.

23 THE COURT: Okay. Earlier in our conversation today,
24 what you said to me was that he communicated with this
25 individual because he had not received any redress otherwise.

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1 I want to make sure I understand how many times he tried to get
2 them to do things only to receive no response.

3 MS. ZAHARIA: No, I apologize, your Honor.

4 THE COURT: That's fine.

5 MS. ZAHARIA: McGucken sent the cease and desist
6 letter on April 4 and received no response. The notice was
7 sent to the designated copyright agent, and after he received
8 no response, in October we filed the complaint.

9 THE COURT: Thank you. That clarification is what I
10 needed. Okay.

11 I don't want you to start anticipating their
12 arguments, I want to hear what they are first. One of the
13 reasons I have a premotion conference, in addition to making
14 sure I understand the case a little bit better, is there are
15 some deficiencies in pleading that can be corrected by an
16 amended complaint, or there are some things that are arguably
17 deficiencies in pleading that can be corrected by an amended
18 complaint.

19 So what I am trying to prevent is a situation where
20 they file a motion to dismiss and you respond with an amended
21 complaint that obviates some or all of their issues, because
22 then I feel as though we've just wasted time.

23 Having looked at the defense letter to me, and
24 recognizing that you don't agree with it, are there amendments
25 that you would want to make to the pleadings to perhaps either

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1 address or minimize or reduce the force of certain of the
2 arguments they wish to make?

3 MS. ZAHARIA: We could certainly provide the copyright
4 registration as an exhibit to the complaint, and include the
5 actual information in the complaint itself.

6 THE COURT: Okay. Other than that, there is nothing
7 else you wish to do to amend your complaint?

8 MS. ZAHARIA: Not that I can think of currently, your
9 Honor.

10 THE COURT: Of course. Okay. I'll ask because this
11 is what I do as a judge. There is no possibility of settling
12 the case at this time?

13 MS. ZAHARIA: Plaintiff is amenable to settlement,
14 whether before the magistrate judge or before a mediator.

15 THE COURT: Okay. I ask because I don't know the
16 costs of a motion to dismiss. But I also don't know the type
17 of -- this is not my first of these cases. Probably I've had
18 several hundred of them. And in some cases, I think for me,
19 not for either side, it's the delicate balance between
20 something that is more than what would have been the licensing
21 fee and less than a full willful copyright infringement
22 payment. What that number is varies among the cases that I
23 have.

24 But I suspect they would be willing to pay you
25 something equivalent to a licensing fee, and I suspect you

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1 would be happy to settle at something close to willful
2 infringement. Between the two them is a number, and I wondered
3 if you had explored with defense counsel the possibility of
4 settling this matter at this stage in the case.

5 MS. ZAHARIA: I believe we requested certain
6 information before so we could make an informed demand. But,
7 if your Honor feels that this case is appropriate for
8 settlement, then we respectfully defer to you.

9 THE COURT: Well, you may have heard me speaking with
10 Mr. Casiano in my last conference. I don't force the parties
11 into settlement. This something that annoys some attorneys.
12 They wish that I would. But I think that it is unfair to make
13 a party go to a mediation or a settlement conference when they
14 don't want to. I rely on the maturity and the thoughtfulness
15 of my attorneys and parties who appear before me in deciding
16 whether this is something they want to do.

17 I simply feel that it is appropriate to ask before we
18 engage in either the expense of discovery or the expense of
19 motion practice whether that's something that the parties want
20 to do.

21 But let me do this. I'll hear from your adversaries
22 about their motion, I'll hear from you about your thoughts on
23 that motion, and perhaps we'll then revisit the issue.

24 Before I do that, if there is anything that is
25 specific to your case but not a response to their motion,

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1 please let me know.

2 MS. ZAHARIA: No, nothing at this time, your Honor.

3 THE COURT: Thank you so much. Ms. Wolff, when you're
4 ready I will hear from you.

5 MS. WOLFF: Thank you.

6 THE COURT: That's fine. First of all, perhaps you
7 did not have the registration date until now. But I now have
8 it; you do too. I don't know if that changes the arguments
9 that you wish to make to me. So I will hear from you on that.

10 MS. WOLFF: That was one of several arguments. And
11 the facts as we know it are slightly different.

12 THE COURT: Okay.

13 MS. WOLFF: Newsweek of course is a reputable and
14 established publisher. And it wrote an article about this sort
15 of ephemeral lake that instantly appeared in Death Valley, as
16 it said, huge lake appears in Death Valley, one of the hottest,
17 driest places on earth. As part of the article it referenced
18 quotes from Mr. McGucken in SFGate, another online publication
19 where he was quoted and --

20 THE COURT: Let's pause there for a moment. I was
21 mistaken in thinking that Mr. McGucken had been interviewed.
22 Is it your understanding that the quotes in SFGate were
23 something different from his Instagram feed?

24 MS. WOLFF: Yes.

25 THE COURT: Okay.

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1 MS. WOLFF: Yes.

2 THE COURT: He actually was interviewed?

3 MS. WOLFF: Well, the article, the full article is not
4 attached to the complaint, but I do have it here.

5 THE COURT: Okay.

6 MS. WOLFF: And there's quotes, and it says, I quote,
7 "Photographer Elliot McGucken captured the salt creek spectacle
8 and shared several snaps on Instagram this week." And it
9 quotes him, "It is a surreal feeling seeing so much water in
10 the world's driest place, he told SFGate. Nature presents this
11 ephemeral beauty and I think a lot of what photography is about
12 is searching for and then capturing it."

13 And what Newsweek did is that it took -- it used an
14 Instagram API that licensed publishers, online publishers to
15 use the API to share public Instagram content.

16 THE COURT: Yes.

17 MS. WOLFF: So it followed those rules, and I could
18 walk up and show it to you, but the entire post then -- the
19 article continues and says, "McGucken said park officials told
20 him the lake appeared to reach a length of 10 miles at its peak
21 but they don't know exactly how large the body of water had
22 stretched. Although the water was still there Tuesday, the
23 lake is reportedly shrinking."

24 So, according to the license in Instagram, it used the
25 API that the allows an online publisher to use an embed, and it

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1 takes the entire Instagram photograph, with all the hashtags
2 and the comments of the photographer.

3 So the article was sort of about this ephemeral idea
4 of photography, about this photographer, and the fact that he
5 was able to take this photograph before this lake disappeared.
6 And then it went on talking about -- the article talks about
7 storms and other things that have been battling California.

8 THE COURT: There is no suggestion that that
9 information came from Mr. McGucken?

10 MS. WOLFF: The following did not, no. It was an
11 article about sort of the phenomenons that have been happening
12 in California where there is either too little water or too
13 much water.

14 At the end, they do have another photograph that's
15 from Getty Images that they do license, but that's just a
16 photograph. It isn't an embed from a feed where you see
17 everything that Mr. McGucken permitted in the feed.

18 So, Newsweek's position is that when someone chooses
19 the public feature in posting to Instagram, they are agreeing
20 to various terms and conditions, and they're very broad, and
21 they are allowing Instagram to make a sublicense. Part of that
22 sublicense permits publishers to make web posts to develop a
23 story.

24 So this story was in fact about phenomenons in
25 California. It was about Mr. McGucken's actual ability to take

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1 this picture, and the fact that he had made these comments and
2 added this to his feed. It was part of the story, and
3 Newsweek, understanding a lot about publishing and about
4 licensing and copyright, believed that they were well within
5 the bounds of the Instagram license to do so, and that they had
6 rights under this Instagram API that Instagram could sublicense
7 the right to do this because in fact they did not make a copy.
8 It goes directly to the Instagram feed because this was not in
9 the print version, but of course the digital. They couldn't
10 have done this in a print version. The digital version.
11 Whether Newsweek is in print anymore, I'm not sure.

12 THE COURT: They may be down to the online version
13 only, but that's a different issue.

14 MS. WOLFF: Right.

15 THE COURT: Let me say this. Again, this is not my
16 first copyright case of this type. But, it's one of a couple
17 of recent cases where the licensing effect or not of Instagram
18 is at play. I will tell you, I haven't issued a decision on
19 the issue, although at some point in this calendar year I
20 suspect I will be. I don't know that there are many circuit
21 court or district court decisions addressing specifically what
22 happens when you are embedding an image from Instagram. Each
23 of you has made the argument why it does or does not work.
24 But, tell me please, are there -- I don't think the Second
25 Circuit's decided the issue, correct?

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1 MS. WOLFF: The Second Circuit has not decided the
2 issue on these terms. Instagram terms are quite broad. And I
3 know that online contracts are generally valid. So when you
4 agree to terms and conditions, those type of contracts have
5 been found to be valid in other contexts. So when you click on
6 and online say I agree and I accept, which I believe when you
7 upload your Instagram post you are agreeing to Instagram terms
8 of use. And those terms of use include this policy that says
9 if you elect to put it make it public, others will use your
10 works according to our policies, and let me just read the one
11 policy at issue.

12 THE COURT: Please.

13 MS. WOLFF: That's the most relevant. They have many
14 policies. They have a whole section on rights. In fact, I've
15 been following this for years as I represent a trade
16 association of all the image licensors. We've been keeping our
17 eye on this. It says "We don't claim ownership of your content
18 but you grant us a license to use it."

19 THE COURT: Slow down for court reporter and judge.

20 MS. WOLFF: I'm sorry. So it's permission you give to
21 us. And "as part of our agreement, you also give us permission
22 that we need to provide the service." So it starts in bold,
23 "We do not claim ownership of your content but you grant us a
24 license to use it." Then there is some other content, it says,
25 "Instead, when you share, post or upload content that is

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1 covered by an intellectual property rights like photos or
2 videos, on or in connection with our service, you hereby grant
3 to us a non-exclusive royalty free transferable sublicensable
4 worldwide license to host, use, distribute, modify, run, copy,
5 publicly perform, display, translate and create different works
6 of your content consistent with your privacy and application
7 settings."

8 THE COURT: Let's pause right there, please.

9 MS. WOLFF: But then -- yeah. I meant this one.

10 THE COURT: That's fine. Before we do that, I want to
11 make sure I understand what that means. Clearly, what that
12 prevents is someone posting something to Instagram and then
13 suing Instagram for copyright violation. But according to your
14 adversary, these terms also make clear that there are no rights
15 created in favor of third parties. So, how do I reconcile
16 that?

17 MS. WOLFF: So I don't think that's accurate.

18 THE COURT: Okay.

19 MS. WOLFF: That there are certain rights that third
20 parties can have because this API embed is part of the
21 Instagram platform policy. And part of the platform policy
22 which everyone who uses Instagram agrees to, states that
23 "Finally, we provide the Instagram platform to help
24 broadcasters and publishers discover content, get digital
25 rights to media and share media using web embed." And that's

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1 exactly what Newsweek did. So the line that McGucken's
2 attorney referenced to was only half of the -- where it says we
3 don't grant you, it wasn't the entire --

4 THE COURT: It says this agreement does not give
5 rights to any third parties. That's quoted from the terms of
6 use.

7 MS. WOLFF: Right. But I believe it goes on further.
8 If I could find that section of the terms of use.

9 THE COURT: Okay.

10 MS. WOLFF: I don't know what rights that's
11 referencing, because it says it doesn't transfer copyrights.
12 But it is sublicensable, and it does say when you upload the
13 platform that you can embed. And I suspect they don't believe
14 that embedding is giving rights to third parties because
15 nothing's been transferred. Because the embed is just code
16 that brings you straight back to Instagram. So what you are
17 viewing is the Instagram page.

18 THE COURT: Let's put this into real life. If I am a
19 person who is not a commercial photographer and I post
20 something to Instagram, according to the terms of use, I have
21 given a limited license to Instagram. Correct?

22 MS. WOLFF: It depends if you post it private or
23 public.

24 THE COURT: Yes. Okay. And here it was public, and
25 so therefore, in my hypothetical it would be public as well.

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1 Instagram doesn't owe me anything for that, for the fact that
2 I've posted a picture, nor do I owe Instagram anything for
3 posting a picture through their platform.

4 MS. WOLFF: That's correct.

5 THE COURT: But the extension of that argument you are
6 making is that anybody else, whether it be my mom or my law
7 clerk or Newsweek, can take something that I have publicly
8 posted to Instagram, and by embedding it in their own work, can
9 use the image in the form of the embed without paying anything
10 for it. Because we are talking about a license, but no one's
11 paying the poster anything. Correct?

12 MS. WOLFF: No one's paying for the post, but if you
13 grant the right to make a sublicense, you allow someone to
14 allow a third party, it has to be outside the system, to use
15 it. And when you do the embed, you can't just frame it so all
16 you have is the image.

17 The way it looks in the Newsweek article you see all
18 the attributions. So I believe the embed policy rights require
19 you to maintain all the attribution, what goes with it. So you
20 have all the hashtags.

21 THE COURT: You have who did the posting, when it was
22 done, and how many followers they have, and what they have been
23 following so it looks just like --

24 MS. WOLFF: Just like the -- there was no restriction
25 on Mr. McGucken's post saying no one can reuse this. And the

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1 policy specifically said it's used for publishers to make these
2 web embeds as part of their story.

3 So, it would seem clear, if you read all the terms --
4 and I don't know how many do -- but if you do read all these
5 terms, that there would be third-party publishers, that if they
6 use this particular API, that they could embed, which would
7 make the article part of the story itself. But it brings you
8 right back to the Instagram user's page with all the Instagram
9 user's content, with the hashtag, which could easily send you
10 back to his site, where if you wanted to acquire a work of fine
11 art, you could do that.

12 THE COURT: But your argument is, it's not the same
13 thing as taking a photograph that someone else has taken and
14 placing it into a written article. The Newsweek article is an
15 article that contains basically a window into an Instagram
16 feed.

17 MS. WOLFF: Right. And in addition, there was
18 relevance to why this Instagram post was used. Because they
19 were talking about this photographer, and how he was able to
20 capture this ephemeral incident that happened where you had a
21 lake that was I guess disappearing and evaporating moment by
22 moment. And how photography is ephemeral, and so the whole
23 story incorporated the idea of photography, Mr. McGucken's
24 photography, the fact he could actually take this picture. So
25 the article in part was really about this photograph, about

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1 him, and how he could capture it. So, there was relevance to
2 embedding. And if they only wanted the photo, then they would
3 have typically just licensed the photo, but this wasn't just
4 about the photo. This was about him and the fact that he took
5 this Instagram picture. And so, that was the purpose of using
6 the embed and going directly to his website, because it was
7 part of the story.

8 THE COURT: Does Newsweek have a relationship with
9 SFGate?

10 MS. WOLFF: I don't know.

11 THE COURT: Okay.

12 MS. WOLFF: But I believe --

13 THE COURT: No one from SFGate has complained about
14 copying pieces of their interview. I think it's actually
15 Dr. McGucken and not mister.

16 MS. WOLFF: Yes, you're right.

17 THE COURT: But, point is, I didn't know until you
18 told me, that he was interviewed by SFGate.

19 MS. WOLFF: Right. The entire article --

20 THE COURT: Yes.

21 MS. WOLFF: -- from Newsweek has a portion of the
22 interview. And I'm sorry, because in the interview he is
23 called Elliot McGucken and not Dr. McGucken, so I wasn't aware.

24 THE COURT: That's fine. We'll figure that out later
25 on in this case. All right.

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1 I will tell you, just thinking out loud for a moment,
2 I don't know that I would be able to decide fair use as a
3 matter of law on a motion to dismiss. What you are really
4 saying to me is that I don't need to worry about that, because
5 I can just look at the relevant Instagram agreements, and that
6 will give me the comfort that I need that this is not in fact a
7 copyright violation.

8 But, as a practical matter, if I were someone who did
9 make my living on photography, and I had the decision to post
10 it publicly so that it was more widely available, the risk I
11 run is that others could embed my Instagram posts into their
12 articles, thereby potentially depriving me of license fees that
13 would be associated with those photographs.

14 MS. WOLFF: Well, I represent many, many
15 photographers, and they use Instagram because it's a great
16 public portfolio for them. The number of followers they have
17 is what helps give them other assignments and book publishing.
18 And they do know when, I mean, there's many conversations about
19 the fact that these rights are very, very broad and this can
20 happen. I think it's a balance that photographers and other
21 artists take when they use social media, that they have given
22 the social media accounts very broad terms, and Instagram has
23 created these APIs that allow web publishers to use Instagram
24 posts that are made public.

25 So Instagram is helping facilitate stories and they do

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1 say that in their platform policy. They make it clear that if
2 you do choose public, then they do allow publishers to use the
3 account. But again, you're not just grabbing a photograph to
4 illustrate something. You have to grab, from what I
5 understand, of the embed, you get the whole post. So you get
6 all the information about the content.

7 But that is a tradeoff that photographers make when
8 they use platforms like Instagram.

9 THE COURT: When we began this segment of our
10 discussion, I asked you about the amendments that were proposed
11 by plaintiff's counsel, and you indicated that it addressed one
12 but not the majority of the claims that you raised. I will ask
13 you the same question I asked of Ms. Zaharia, which is, is it
14 your client's wish to proceed to motion practice or is there
15 any interest in trying to resolve the case before the motion is
16 filed?

17 MS. WOLFF: I might turn this over to my colleague
18 Lindsay who had the conversation with the client.

19 THE COURT: Thank you very much.

20 MS. EDELSTEIN: So there's not much by way of an
21 update, I guess. Just that our client wanted to see the motion
22 through, and then we would discuss. But if your inclination is
23 we should revisit that.

24 THE COURT: Please understand, this is not some subtle
25 way I have of telling you what to do. I am simply aware as a

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1 human being and as a former practicing lawyer that motions cost
2 money. For some entities and litigants, it's cheaper, given
3 the potential uncertainties, to settle. But for others, they
4 are concerned about the possibility of similar claims being
5 raised in the future and wanting some clarification on the
6 issue. Or it may just be that the parties are too far apart in
7 terms of the bid and ask on settlement.

8 I'm agnostic as to whether the case settles. I want
9 to know before I schedule a motion whether the parties have
10 considered the possibility of settlement. That's really all
11 I'm asking.

12 MS. WOLFF: As a publisher, Newsweek believed it had
13 the right to use the Instagram APIs as part of its story. It
14 used the API. It licensed a photograph from Getty for a
15 different part of the story.

16 I think part of the concern is that because Instagram
17 has offered publishers these APIs, that they do use these. And
18 that it would be an issue if they have other embeds, I'd have
19 to talk further to my client, but I think that's why they asked
20 us to bring this motion initially, based on the license as part
21 of this API.

22 Also, one other factor just to clear up, the client
23 has no recollection of receiving the first letter. We have
24 asked them, and they just did not have any recall of ever
25 getting notice to have this taken down.

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1 THE COURT: What if they had? What if they had
2 received the letter in or about April of last year. Would they
3 have taken it down? Because on the theory that you are
4 espousing before me this afternoon, there's no legal reason for
5 them to have to do so.

6 MS. WOLFF: I don't know. It is a hypothetical.

7 THE COURT: Yes.

8 MS. WOLFF: Publishers often will, if they get notice
9 of something, take it down just to investigate until they know
10 the legalities. That's just a practice, but I don't know what
11 Newsweek's practice is.

12 THE COURT: Okay. Is there a central location or an
13 easily identified person or e-mail address to which cease and
14 desist letters of the type described by plaintiff should be
15 sent?

16 MS. WOLFF: They do have a registered agent.

17 THE COURT: Okay. That seems to be where it was sent.

18 MS. WOLFF: We'd have to check with the client. I
19 don't know --

20 THE COURT: Okay.

21 MS. WOLFF: -- what went wrong.

22 THE COURT: All right. Let me please return to
23 Ms. Zaharia. Thank you very much.

24 MS. WOLFF: Okay.

25 THE COURT: Ms. Zaharia, let me hear you in

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1 opposition. First of all, was your client interviewed by
2 SFGate or someone else?

3 MS. ZAHARIA: Yes, your Honor. I apologize. I
4 misspoke. I thought he only licensed the photograph to SFGate,
5 but he did provide some quotes.

6 THE COURT: So it wasn't merely the obtaining of
7 quotes from the Instagram feed. He actually was interviewed by
8 SFGate.

9 MS. ZAHARIA: Correct.

10 THE COURT: And he did give a license to SFGate.

11 MS. ZAHARIA: Correct.

12 THE COURT: Of course where that license extends is a
13 different issue.

14 Let me hear from you. Your client does this for a
15 living, yes?

16 MS. ZAHARIA: Yes, your Honor.

17 THE COURT: He is a doctor, I don't know if he is a
18 doctor in fine art or something else. Is he not a doctor?

19 MS. ZAHARIA: He is a doctor.

20 THE COURT: Okay. Medical doctor?

21 MS. ZAHARIA: No, I believe he has a PhD in nature
22 photography. I don't want to misstate.

23 THE COURT: I don't want you to. What is his job? Is
24 he someone who takes photographs and then sells them for a
25 living? Is he someone who writes and speaks and discusses

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1 nature for a living? Does he teach? Or some combination of
2 that?

3 MS. ZAHARIA: Combination of that, your Honor.

4 THE COURT: One of the things he does is he takes
5 photographs of nature and natural phenomena and sells them for
6 a profit.

7 MS. ZAHARIA: That's correct. He treats his
8 photography more as fine art. I wanted to clarify that. So
9 it's my understanding that he's highly selective about who
10 he'll license the photographs to, because he treats his prints
11 as fine art.

12 THE COURT: When he posts things on Instagram, is he
13 posting them publicly or privately or both?

14 MS. ZAHARIA: He's posting them publicly.

15 THE COURT: What does he understand his agreement with
16 Instagram to be?

17 MS. ZAHARIA: I believe he understands his agreement
18 with Instagram to be that by simply using Instagram, he is not
19 giving third parties permission to do whatever they'd like to
20 do with his work. The terms of use indicate that the agreement
21 doesn't give rights to any third parties. And it seems that
22 these guidelines are meant to help Instagram users themselves,
23 not third parties.

24 As a matter of fact, their platform policy indicates
25 that it provides guidelines "to help members of our community

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1 share their own content with apps or services." And Instagram
2 also further instructs brands to not promote content that
3 violates any rights of any person, including, but not limited
4 to intellectual property rights, rights of privacy, or rights
5 of personality.

6 Instagram also notes that brands are "solely
7 responsible for making use of user content in compliance with
8 owners' requirements or restrictions." And Newsweek failed to
9 obtain permission from Dr. McGucken to use his photograph.

10 THE COURT: Just one moment, please. I was looking at
11 the frequently asked questions on Instagram regarding copyright
12 law. And they make a point of telling me they can't provide
13 legal advice, which I do appreciate. It just seems to me that
14 the questions that they are asking really relate to the
15 original posters' prevention of copyright violations, but in
16 the sense of making sure that someone who is posting a
17 photograph is not posting a photograph in which someone else
18 has a copyright interest, which is not what happened here in
19 your case. Your client is the original poster of the
20 photograph on Instagram. No one is suggesting he did not have
21 a copyright in that photograph, although we now know the date
22 of it.

23 Instagram, at least the questions I've been reviewing,
24 is not so helpful in letting me know what happens with the
25 embeds later on. I guess that's what this litigation is about.

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1 So this is where you and defense part company. Your
2 view is that these terms of use are useful to the poster, so
3 the poster knows he or she is not violating the copyright law,
4 but in no way do they provide any ability to a third party or
5 any safe harbor for a third party who wishes to embed an
6 Instagram image into their works. Is that correct?

7 MS. ZAHARIA: That's correct, your Honor. And the
8 Southern District has also held in Goldman v. Breitbart that
9 when a defendant causes an embedded image to appear on the
10 defendant's website, defendant has violated a copyright owner's
11 exclusive display right, irrespective of the fact that the
12 image is stored on the server on an unrelated third party such
13 as a social media platform, Instagram.

14 THE COURT: To be fair, or not, the Breitbart case is
15 of course not precedential to me, it is a sister court in this
16 district. But are the terms of use on Breitbart identical to
17 those on Instagram? I have not sat down and compared all of
18 the relevant policies to know whether there is any wiggle room
19 among them.

20 MS. ZAHARIA: I believe that they are similar, but I
21 do think that Instagram gives more guidelines in their
22 policies.

23 THE COURT: Okay. So it wasn't that I didn't see your
24 citation. I am not sure it's dispositive of my issue. Other
25 things you'd like me to know?

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1 MS. ZAHARIA: Yes. I also wanted to indicate that I
2 believe we provided defense counsel with a copy of the
3 copyright registration and cease and desist letter via email on
4 November 14.

5 THE COURT: Okay. You have it now? Yes. Yes, they
6 do have it now. They didn't have it then, but they do have it
7 now. Their client still can't find the copy that was sent to
8 them in April, which is unfortunate, but the way things are.

9 Other things?

10 MS. ZAHARIA: That's all, your Honor. Just to
11 reiterate that we don't believe that the Instagram API
12 authorizes third parties to exploit, reproduce or display
13 Instagram users' content without permission.

14 THE COURT: Thank you. Ms. Wolff, you wanted to be
15 heard briefly in reply?

16 MS. WOLFF: Briefly. I'll try to keep it brief.

17 So, the platform policy that we addressed has two
18 parts. And it says that Instagram -- the Instagram platform
19 supports several types of apps and services. The one
20 plaintiffs reference is just one type. First, we provide them
21 to help members of our community share their own content with
22 apps or services. And then it says: We also support apps and
23 services that help brands and advertisers understand and
24 provide the Instagram platform to help broadcasters and publish
25 discover content, get digital rights to media, and share media

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1 using web embeds.

2 And so a web embed doesn't mean you can do anything
3 you want with someone's content. It means that you are
4 directed back to the Instagram account. That is very different
5 than what happened in the Breitbart case that I'm familiar
6 with. Breitbart did not actually use -- not Breitbart. the
7 photographer did not use Twitter. He was actually using a
8 private Snapchat group. One of the members of the group took
9 literally a screen save of his photo, posted it on Twitter.
10 Then what happened is the media then used what was called
11 framing, and so they didn't take the entire Twitter account.
12 They only took the photograph and framed it so it was
13 completely integrated into the article. And there was no
14 reference to anything about how the photographer took the
15 picture, it was used invisibly, so it looked like it was
16 seamlessly woven into the article. Which is very different
17 from this instance where Newsweek, using the Instagram API
18 embed, incorporates the entire Instagram feed, which has --
19 maybe it's not called a feed on Instagram. But the Instagram
20 image with all the numerous hashtags and comments actually and
21 did write the story about it. So I think that those two
22 situations are very different.

23 The only thing we would address per the motion to
24 dismiss was for the secondary liability, because we don't
25 believe that's been pled. There isn't one instance of any

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1 direct infringement by a third party because of this article
2 that was written about in Newsweek, which was required, and in
3 fact I believe the same plaintiff recently had a case dismissed
4 in California based on the secondary liability claim for also
5 not pleading any facts that would support that a third party
6 had used this image merely because of the actions of Newsweek.

7 THE COURT: Well I thought I understood from your
8 adversary that is something that they intend to develop further
9 in discovery, and that they are not in a position to identify
10 those entities at this time, which is why they are listed as
11 John Does. But hopefully they believe with discovery, they
12 would be able to identify someone.

13 I suppose you are going to tell me that's insufficient
14 to keep the claim in at this time.

15 MS. WOLFF: That's correct.

16 THE COURT: We'll see. I did offer to Ms. Zaharia an
17 opportunity to replead. She has not asked for a repleading on
18 that point, probably because she cannot identify with
19 specificity entities who may have contributed to the
20 infringement.

21 MS. WOLFF: I think the last thing was that I think
22 when Instagram says it doesn't grant any rights, a sublicense
23 is a license. It is not giving someone rights. And an embed
24 is directing you right back to the Instagram page. So I think
25 they are consistent to be read together.

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1 THE COURT: All right. Again, as I began, part of my
2 reason for having this conference is to understand the case
3 better. I thank you all for be so prepared to help with that
4 point. The second was to see whether, if you will, you are
5 hellbent on filing this motion. And it sounds like, having
6 discussed this with your client, you are. And the third part
7 was did the plaintiff want to amend, which apparently on one
8 level he does.

9 So, Ms. Zaharia, how much time would you like to file
10 an amended complaint in this case, please?

11 MS. ZAHARIA: We could do that within two weeks, your
12 Honor.

13 THE COURT: Let me please get me calendar together.
14 Let's go to the 24th of January.

15 Ms. Wolff, is it still your client's intent to file a
16 motion to dismiss?

17 MS. WOLFF: As far as I know. We'll of course discuss
18 this conference with our client.

19 THE COURT: Don't read too much into it. Sometimes it
20 is easier to settle, sometimes it is not. You all make the
21 decision that's right for you. I have the obligation to
22 explore it. How much time would you like to file your motion,
23 your opening brief?

24 MS. WOLFF: Two weeks after the amended --

25 THE COURT: That's fine. That's aggressive, but it's

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1 fine by me.

2 MS. WOLFF: Then we'll take three.

3 THE COURT: Let me give you until February 28, and for
4 the response March 30, the opposition, and then the reply
5 April 13. I believe those are all days that are actual
6 business days when court is in session. And you will tell me
7 if they are not.

8 All right. Ms. Wolff, because it is your client's
9 desire to file a motion in this case, please get a transcript
10 of this conference.

11 MS. WOLFF: Sure.

12 THE COURT: And if you order it, I'll receive it
13 automatically. When I have the briefing, I want to have as
14 well the transcript of this conference so I can remind myself
15 of what we've discussed.

16 And Ms. Wolff, inasmuch as you are the movant, is
17 there anything else you want to bring to my attention in this
18 proceeding?

19 MS. WOLFF: No, your Honor.

20 THE COURT: Thank you. Ms. Zaharia, anything else
21 you'd like to bring to my attention in this proceeding?

22 MS. ZAHARIA: No, your Honor.

23 THE COURT: Thank you very much. We are adjourned.

24 (Adjourned)
25